Supreme Court, U.S.
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No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,
Petitioner,

v.

DONALD J. GRALIKE AND MIKE HARMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Constitution permits a state government to place pejorative and misleading ballot labels next to the names of candidates for Congress who do not follow, or do not pledge to follow, the government's instructions to vote for a federal constitutional amendment once favored by a majority of statewide initiative voters.

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BRIEF FOR RESPONDENTS

Through the law challenged in this case (the "Label Law"), the State of Missouri has attempted to skew the outcome of federal elections and federal legislative debate by handicapping candidates who disagree with the government's preferred position on a single issue. The Law "instructs" federal representatives to use "all of [their] delegated powers to pass" a proposed federal constitutional amendment addressing term limits. Mo. Const. art. VIII, § 17. If candidates do not pledge to follow this legal command, or if elected representatives do not, in the view of the Missouri Secretary of State, follow the command, the government will place a negative label—either "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS"—next to their names on the ballot when they run for federal office. The sole expressed intent of the Label Law is to cause the adoption of the proposed amendment. *Id.* § 15.

As shown below, the Label Law contravenes at least five provisions of the federal Constitution. The reasons for each of those violations, however, are much the same: the Constitution prevents the State from using its control over the ballot to skew political debate and handicap federal candidates who do not support the government's preferred position on a single issue. This case is not, as petitioner (the "State") suggests, about the right of the "people" to express their views. Each person in Missouri has the unquestioned right to inform candidates and legislators of his or her views, and to vote accordingly. But the state government may not place its thumb on the electoral scale in an attempt to interfere with the freedom of federal candidates to decide for themselves on which issues they will campaign, and how they will vote if elected.

Shortly after the framing of the Constitution, during the debates in Congress on what would become the Bill of Rights, James Madison made clear that enforceable instructions issued by States to federal representatives were incompatible with the new constitutional system. As he stated, permitting such instructions "obliges us to run the risk of losing the whole system." 1 Annals of Congress 767 (Joseph Gales ed., 1789). If upheld, the Label Law will have precisely that feared result. It will undoubtedly spawn other efforts by state governments to use the ballot to bully federal candidates and representatives who hold disfavored views on other issues, and will transform the ballot from a neutral vehicle for the expression of voter preferences into a mechanism for state coercion of campaign and legislative debate.

STATEMENT OF THE CASE

1. Enactment of the Label Law. In *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779 (1995), this Court held that the Constitution does not permit a State to impose term limits on Members of Congress. The Court accordingly advised that, if such term limits are to be enacted, they "must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the

electoral process—through the amendment procedures set forth in Article V." *Id.* at 837 (footnote omitted).

Nevertheless, following *Thornton* term limits proponents attempted once again to achieve their objective through state legislation. In November 1996, those proponents succeeded in enacting the Label Law through voter initiative. That law, enacted as an amendment to the Missouri Constitution, has three basic components. *First*, the Law states that it is the intention of the "people of Missouri" that the Label Law "lead to the adoption of" a proposed term limits amendment to the United States Constitution. Mo. Const. art. VIII, § 15. The Law sets forth the text of that proposed amendment, which would limit Senators to two terms and Representatives to three terms, although States could alter those limits by amending their own constitutions. *Id.* § 16.

Second, the Label Law expressly "instructs" each Senator and Representative elected from Missouri "to use all of his or her delegated powers to pass the Congressional Term Limits Amendment," *id.* § 17(1), and asks non-incumbent candidates to "pledge" to do the same if elected, *id.* § 18. The instruction is enforced when the person next runs for office. A Member of Congress who fails to comply with any one of a long list of directives shall have the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed on every primary and general election ballot next to his or her name. *Id.* § 17(2) (captitalization in original). This labeling provision remains in effect until Congress passes the proposed amendment. *Id.* § 17(3).

Under the Label Law, a Senator or Representative is labeled if he or she (1) "fails to vote in favor" of the proposed amendment; (2) "fails to second the proposed [amendment] if it lacks for a second"; (3) "fails to propose or otherwise bring to a vote of the full legislative body the proposed [amendment]" if it lacks such a sponsor; (4) "fails to vote in favor of all votes bringing the proposed [amendment] before any committee or subcommittee"; (5) "fails to reject any attempt

to delay, table, or otherwise prevent a vote by the full legislative body of the proposed [amendment]"; (6) "fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed [amendment] regardless of any other actions in support of the proposed [amendment]"; (7) "sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed [amendment]"; or (8) fails to ensure that all votes on the proposed amendment are made public. *Id.* § 17(2)(a)-(h).

The Label Law also affords non-incumbent candidates for Congress the "opportunity" to take a term limits "pledge." *Id.* § 18(1). Candidates who do not take the pledge shall have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed beside their names on every primary and general election ballot. *Id.* (capitalization in original). To avoid the label, a non-incumbent must pledge as follows:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name. [*Id.* § 18(3).]

Because of these labeling provisions, the Label Law has often been referred to as the "Scarlet Letter" law—including by the Missouri Secretary of State's office and Members of Congress from Missouri. *See, e.g.*, J.A. 34; 143 Cong. Rec. H494 (daily ed. Feb. 12, 1997) (statement of Rep. Blunt); *id.* at E277 (Feb. 13, 1997) (statement of Rep. Emerson).

Third, the Label Law makes Missouri's Secretary of State—an elected, political official—responsible for determining whether a candidate shall receive either of the labels. Mo. Const. art. VIII, § 19(1). In making that determination, the Secretary is required to consider public comments. *Id.*

§ 19(2). The process, however, is biased in favor of labeling. If the Secretary decides that a particular candidate is not to be labeled, any "elector" (voter) may appeal that decision to the Missouri Supreme Court, and in such actions, the burden is on the Secretary "to demonstrate by clear and convincing evidence that the candidate * * * should not" be labeled. *Id.* § 19(5). But if the Secretary decides that a candidate is to be labeled, the candidate may appeal, and the burden is on the candidate to show under the clear and convincing standard that the label should not be applied. *Id.* § 19(6).

2. Invalidation of the Label Law. Respondent Donald J. Gralike, a Democratic candidate for the House of Representatives from Missouri during the 1998 election, filed suit against petitioner, Missouri's Secretary of State, seeking to enjoin enforcement of the Label Law. He made clear that his political beliefs prevented him from taking the term limits pledge, and he challenged the constitutionality of the Label Law, including the pledge, the instructions and label incorporated within the pledge, and the label that would be imposed on him for not taking the pledge. *See* J.A. 3-14.[1]

The District Court granted summary judgment in Gralike's favor, holding that the Label Law violated four separate constitutional provisions: the Qualifications and Elections Clauses, Article V, and the First Amendment. Pet. App. A27-A35, A40-52, A58-A62. The Eighth Circuit affirmed,

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[1] While the case was on appeal, Gralike withdrew from the 1998 election, and respondent Mike Harman, another congressional candidate, intervened as an appellee. Harman was also a candidate in the 2000 Republican congressional primary, and both respondents intend to run again in the future. But regardless of respondents' current status or plans, this case is not moot because it is well settled that election law challenges such as this one are "capable of repetition, yet evading review." *See, e.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). *Cf. Chandler* v. *Miller*, 520 U.S. 305, 313 n.2 (1997).

holding in addition that the Law violated the Speech or Debate Clause. Pet. App. A1-A23.[2]

3. Label Laws in Other States. Missouri was not the only State to enact such a law—and the Eighth Circuit was not the only court to invalidate it. Indeed, *no* court has upheld such a law. In 1996, voter initiatives quite similar to the Missouri law were approved in eight other States—Alaska, Arkansas, Colorado, Idaho, Maine, Nebraska, Nevada, and South Dakota. Six of those other laws were challenged in court and invalidated on various federal and state constitutional

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[2] The State rightly does not dispute respondents' standing. Respondents have standing to challenge the provisions of the Label Law imposing a negative label on them for failing to take the term limits pledge, because that label would harm their electoral chances, and deter or alter their campaign plans. *See, e.g.*, *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 141 (1951) (upholding standing to challenge political label); J.A. 7 (complaint). As the District Court held, respondents also have standing to challenge the instructions to incumbents, and the labels imposed for not following them, because the pledge applicable to respondents expressly incorporates the incumbent instructions and labels. *See* Pet. App. 62a. The pledge reads, in part, "If elected, I pledge to vote in such a way that the designation 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' will not appear adjacent to my name." Mo. Const. art. VIII, § 18(3). Thus, non-incumbent candidates suffer a present injury-in-fact directly traceable to the instruction provisions. If those provisions are unconstitutional, the pledge is also void, and respondents cannot be forced to suffer a negative label for not taking that pledge. The incumbent provisions also directly affect non-incumbents because the provisions deter term limits opponents from running at all, and harm their ability to raise funds and attract support. *See* J.A. 7 (instructions would deter Gralike from running). Finally, respondents also have standing as voters to challenge the incumbent provisions, which harm their ability to elect a candidate who is capable of representing their views. *See Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992); *Baker* v. *Carr*, 369 U.S. 186, 206 (1962); *Miller* v. *Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999).

grounds.[3] And in the other two states, the state attorneys general declared that the laws could not be enforced consistent with the federal Constitution. *See* Alaska Op. Att'y Gen. No. 2 (1998); Nevada Att'y Gen. Op. No. 2000-11. In 1998, California became the last State to adopt a label law, known as Proposition 225, and that law, too, was held unconstitutional. *See Bramberg* v. *Jones*, 978 P.2d 1240 (Cal. 1999).

4. The Label Law's Effect on Elections. Only California's label law was in effect long enough for it to be applied in an election before it was struck down. One of the State's *amici* contends that California's experience supports the notion that the ballot labels are not coercive. *See* Initiative & Referendum Inst. Br. 7. In fact, election results which that *amicus* omits from its brief show that, as one observer noted, "the short-lived measure may have had a major impact" on a state legislative race. Maura Dolan, *Initiative on Term-Limits Loyalty Voided*, L.A. Times, July 9, 1999, at A3.

Proposition 225 (which applied to both state and federal candidates) was enforced in a special election held in 1999 to fill the vacant 16th District seat in the state Assembly. The three Democratic candidates in the race were labeled "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," but the Green Party candidate (Audie Bock) took the pledge and was not labeled. *Id.* In the four-way contest, the former mayor of Oakland (Elihu Harris) received a plurality of the vote—48.8%—and soundly beat his two Democratic rivals, but was forced into a runoff with Bock, who had received

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[3] *See Miller*, 169 F.3d 1119; *Barker* v. *Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998); *League of Women Voters* v. *Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan* v. *Priest*, 931 S.W.2d 119 (Ark. 1996), *cert. denied*, 519 U.S. 1149 (1997); *Morrissey* v. *State*, 951 P.2d 911 (Colo. 1998); *Simpson* v. *Cenarrusa*, 944 P.2d 1372 (Idaho 1997); *see also Opinion of the Justices*, 673 A.2d 693 (Me. 1996). In addition, in Oklahoma an initiative was invalidated before it was put to a vote. *See In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996).

only 8.7% of the vote. Harris was widely expected to win the runoff by a large margin, but in "a major upset" Bock defeated Harris by only 300 votes, becoming the first person from her party ever elected to a state legislature. *Id.* An assistant to Bock stated publicly that the label probably helped defeat Harris: " 'Did 300 people think that was an important thing?' * * * 'Probably.' " *Id.* *See also* Bob Egelko, *Term-Limits Initiative Struck Down*, Orange County Register, July 9, 1999, at A5 (term limits label "may have influenced the outcome" of the election).[4]

Thus, the public record confirms the obvious: that the ballot label can cost votes, and thus will have a coercive effect on candidates and their campaigns. *See* Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533, 1554 (1999) ("ballot notations may exert a significant influence on electoral outcomes").

5. The Label Law's Effect on Members of Congress. The various label laws also had a clear impact on Members of Congress. Shortly after those laws were enacted, Congress considered proposed term limits amendments to the Constitution. *See* 143 Cong. Rec. H458-H512 (daily ed. Feb. 12, 1997). The base proposal, offered by Rep. McCollum, would have limited Representatives to six terms.

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[4] Proposition 225 was also in effect for the 1998 election for California's 9th Senate District seat. That race pitted a labeled Democrat against a labeled Peace and Freedom Party candidate and an unlabeled Republican. *See* Bob Egelko, *Candidates Face Ballot Labeling Over Term Limits*, San Diego Union-Trib., Aug. 23, 1998, at A3. That the labeled Democrat won the general election says very little, however, because the 9th District is "overwhelmingly Democratic." Thaai Walker, *Perata Wins Assembly, Senate Seats*, San Fran. Chron., Nov. 4, 1998, at A23. *See also* Egelko, *supra*. The labels also made no difference in the outcome of the Democratic primary since all three of the candidates in that race were labeled. *See* Robert Salladay, *Hot Battle for East Bay Senate Seat*, San Fran. Examiner, Aug. 27, 1998, at A5.

The term limits amendment contained in the label laws, by contrast, would limit Representatives to only *three* terms, and each proposed amendment was slightly different from the others. Thus, to accommodate Representatives from States with such laws, the House voted on seven other proposed amendments, each of which used the exact language required by a state label law.[5] Under those laws, however, legislators who vote for any amendment that would allow representatives to serve more than three terms—even if they *also* vote in favor of the shorter limits—are branded as having "DISREGARDED VOTERS' INSTRUCTIONS." *See, e.g.*, Mo. Const. art. VIII, § 17(2)(f). As the sponsor of one term limits bill explained: "Let us say you are from Missouri * * *. If you vote for the 6-year bill as required in the initiative and you also vote for my 8-year bill, your voters will be told that you do not support term limits on the next ballot." 143 Cong. Rec. H462 (Feb. 12, 1997) (statement of Rep. Fowler).

Numerous legislators from states with label laws, who would otherwise have supported the McCollum proposal, voted against it because of those laws. As Rep. Hutchinson of Arkansas stated, he voted against the McCollum proposal "not because I am opposed to term limits but because this particular resolution does not comply with the term limit instructions approved by the voters and the people of Arkansas * * *. *Id.* at H486. As he explained:

> As a longtime supporter of the concept of term limits, it was my intent as a new Member of this body to support and vote for all term limit measures including 6-year,

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[5] Rep. Blunt, who introduced the Missouri version, explained that it would "ensure that members of the Missouri delegation have the ability to vote for language that meets a verbatim test of [the] Missouri Amendment." *Id.* at H494. Or as another congressman put it: "Every State's Members get to vote on their State's term limits so they make them feel better and they do not get the scarlet letter." *Id.* at H487 (statement of Rep. Frank). In all, the House voted on 11 proposals, including 7 required by label laws.

> 8-year, and 12-year limits so as to maximize the prospects for meaningful term limits becoming law. However, *I am instructed by the Arkansas law and will vote accordingly.* [*Id.* (emphasis added).]

Similarly, Rep. Dickey of Arkansas, who "ha[d] never once voted against term limits at any time," reported that he would vote against some proposed term limits amendments because he was "duty bo[illegible]d to support" only the Arkansas version. *Id.* *See also id.* at H489 (statement of Rep. McInnis of Colorado that he "will follow th[e] instructions" and vote only for the Colorado version); *id.* at H490 (statement of Rep. Crapo of Idaho that, although he had previously voted for the McCollum proposal, he and Rep. Chenoweth "are doing as instructed by the law of the State of Idaho" and voting only for the Idaho version).[6]

Rep. Thune of South Dakota openly acknowledged the coercive force of the ballot labels. Although he had been a cosponsor of the McCollum proposal, he explained that "I had my name removed as a cosponsor" because "I realized that cosponsoring that resolution likely would have forced a negative message next to my name on the 1998 ballot." *Id.* at H499. He noted that "[t]o say the least, that notation would be undesirable to any candidate." *Id.*

In the end, the McCollum proposal received 217 votes, *id.* at H511, which was ten *fewer* votes than the same proposal had received in 1995. *See* 141 Cong. Rec. 9748 (1995). Rep. McCollum attributed the setback to the label laws. As

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[6] The State and its *amici* make much of the fact that Rep. Emerson of Missouri voted in favor of proposals different from the Missouri law, stating that "[i]f that means I invoke a misleading scarlet letter, then so be it." *Id.* at E277 (Feb. 13, 1997). But Rep. Emerson did not think "Missouri's scarlet letter amendment" was inconsequential. *Id.* On the contrary, she called it "deceptive[ ]" and a "farce," and she warned that "ballots will soon be cluttered with inaccurate information." *Id.*

he stated before the vote, "I think there are far more than 227 Members in this body who are for term limits, and if they had their free will and did not have the scarlet letters to be put beside their name[s] in these 9 States * * * they would vote for this." 143 Cong. Rec. H510 (Feb. 12, 1997).[7]

A day earlier, he had noted "[h]ow ironic" it would be if the label laws "gridlock[ed] this body [so that] we never reach the goal ultimately of getting to term limits." *Id.* at H418 (Feb. 11, 1997). It appears that the label laws had precisely that effect. By forcing legislators to support only their own State's version of term limits, the laws proved to be an obstacle to deliberation, compromise, and judgment, and hurt, rather than helped, the cause of term limits.

SUMMARY OF ARGUMENT

The Label Law—for many of the same reasons—contravenes at least *five* separate constitutional provisions. Under those provisions, the Label Law is invalid both because States have no delegated power to destroy the neutrality of federal elections by singling out preferred issues and candidates on the ballot, and because the State may not use its control over the ballot to impair the freedom of candidates and voters to determine for themselves the content of campaign and legislative debate. The ballot is a neutral means for voters to express their political preferences; it is not a means for a state government to decide the issues upon which federal elections will be waged, or to bludgeon candidates into supporting federal legislation favored by the State.

First, the Label Law exceeds the State's authority under the Elections Clause to enact procedural regulations governing the "Times, Places and Manner" of elections, because the Law is predicated on the content of candidates' views, and seeks to skew elections against a disfavored class. *Second*, the Label Law exceeds the State's authority under the Quali-

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[7] The Missouri version was defeated 353-72. *Id.* at H497.

fications Clauses because it is an indirect attempt to handicap those disfavored candidates. As the Framers and their contemporaries made clear—in rejecting a proposal to create a "right to instruct" in the Bill of Rights, and elsewhere—the Constitution did not delegate to States the right to commandeer federal legislators through enforceable instructions like those at issue here. *Third*, the Label Law violates the First Amendment because it is a content- and viewpoint-discriminatory attempt by the state government to compel candidates to speak, and to penalize those who fail to support the State's favored viewpoint. It is also impermissibly vague. *Fourth*, the Label Law is a facial violation of the Speech or Debate Clause because it expressly seeks to coerce core legislative activities of Members of Congress. And *fifth*, the Label Law exceeds the State's role under Article V because it seeks to circumvent the deliberative function conferred on Congress in the process of proposing constitutional amendments.

ARGUMENT

I. THE LABEL LAW EXCEEDS THE STATE'S CONSTITUTIONAL AUTHORITY S

A. The Label Law Exceeds the State's Power Under the Elections and Qualifications Clauses

1. The Elections Clause delegates to state "Legislature[s]" the power to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's right to make or alter such laws (except as to the places of choosing Senators). U.S. Const. art. I, § IV, cl. 1.[8] As this Court has held, that delegation is the *only* power

[8] Relying on *Ohio ex. rel. Davis* v. *Hildebrandt*, 241 U.S. 565 (1916), the State argues that this power delegated to state *legislatures* can be exercised by popular referendum. Pet. Br. 38 n.46. *Davis*, however, rested on the fact that *Congress* had by statute authorized a referendum pursuant to its *own* Elections Clause power. 241 U.S. at 569. No such statute exists here, and the Label Law is invalid for that reason alone. *See California Democratic Party* v. *Jones*, 120 S. Ct. 2402, 2422-23 (2000) (Stevens, J., dissenting); *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1970) (Court may consider any argument in defense of judgment).

the States have to regulate congressional elections, because the Framers understood "that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *Thornton*, 514 U.S. at 804.[9] The Elections Clause does not give the States *carte blanche* to enact any type of election laws. Rather, "[t]he Framers intended the Elections Clause to grant States authority to create *procedural* regulations," *id.* at 832, governing just "the *mechanics* of congressional elections," *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (emphases added). *See Smiley* v. *Holm*, 285 U.S. 355, 366 (1932) (Clause goes to "procedure and safeguards").

Contrary to the State's contentions (Pet. Br. 38), the Label Law exceeds Missouri's authority under the Elections Clause because it is not just a procedural or mechanical regulation.[10] Valid "time, place, and manner" regulations include many things, but the Court has made clear what is *not* included. This precise phrase is employed in First Amendment jurisprudence, and the Court has held that a valid time, place, and manner regulation of speech must be, among other things, "content neutral"—meaning that it must be " 'justified with-

[9] This holding forecloses the State's argument (Pet. Br. 25 n.37) that the Label Law falls within the powers reserved under the Ninth and Tenth Amendments. *See also Newberry* v. *United States*, 256 U.S. 232, 281 (1921) (Pitney, J., concurring in part) ("The reservation contained in the Tenth Amendment cannot properly operate upon this subject [federal elections] in favor of the state governments; they could not reserve power over a matter that had no previous existence."), *overruled on other grounds*, *United States* v. *Classic*, 313 U.S. 299, 319 (1941) (endorsing Justice Pitney's concurrence).

[10] Although the Eighth Circuit did not specifically rely on the Elections Clause, respondents expressly raised the argument below, *see* Ct. App. Br. 7-10, and the District Court ruled in their favor on the issue. *See* Pet. App. A42-A43, A45-A46.

out reference to the content of the regulated speech.' " *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation and emphasis omitted).

The Label Law fails this test for content neutrality. Indeed, not only does the Law label candidates based solely on their substantive views on a single issue—the term limits amendment—it is *viewpoint* discriminatory as well because it labels *only* those candidates who disagree with or fail to support the State's favored position on that issue. *See id.* (regulation is not content neutral if adopted "because of disagreement with the message" of the regulated speech). Just as the "time, place, and manner" test ensures government neutrality when regulating speech, so the same test, codified in the Elections Clause, ensures government neutrality in the federal election process. Under that test, the limited power delegated to the States to regulate the "procedures" and "mechanics" of elections does not include the power to regulate the appearance of candidates' names on the ballot according to the content of their views on a particular issue.

The State argues that the Label Law permissibly regulates the manner of elections by merely "disclosing information about congressional candidates." Pet. Br. 28.[11] As noted above, this argument fails because the limited power to regulate the time, place and manner of elections does not include the power to regulate ballots based on the content of a candidate's views on a particular issue. Even if these labels were truly evenhanded—which, as shown below, they are not—singling out term limits as the *only* issue labeled on the ballot would impermissibly skew campaign debate and voting decisions toward that particular issue.[12]

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[11] In her deposition, however, petitioner herself agreed that the Label Law does *not* regulate the time, place, or manner of elections. J.A. 58 (testimony of Rebecca McDowell Cook).

[12] *None* of the other examples of ballot labels given by the State and its *amici*—such as party labels or nicknames—are predicated on the State's assessment of the content of a candidate's views on an issue. The Court need not decide here whether the Constitution would permit a State to require a party label over a candidate's objections. But while party affiliation may correlate to substantive views on some (but not all) issues, a neutral requirement that all party affiliations be listed on the ballot would not be based on the content of a candidate's views on any particular issue.

This fact is made clear by *Anderson* v. *Martin*, 375 U.S. 399 (1964), in which this Court struck down a state law labeling the race of candidates on ballots for state office. The Court said that the "vice" of this law was its "placing of the power of the State behind a racial classification that induces racial prejudice at the polls." *Id.* at 402. Although the case was decided on equal protection grounds, its reasoning is fully applicable here. The Court explained that

> by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. [*Id.*]

So too here. By placing "the power of the State" behind the ballot labels and "directing the citizen's attention to the single consideration" of term limits at the "most crucial stage in the electoral process," the State indicates that this issue "is an important—perhaps paramount—consideration in the citizen's choice," and may thereby "decisively influence" the citizen to vote based on that one issue. As the Court recognized in *Anderson*, such state-imposed, single-issue ballot labels destroy the neutrality of the electoral process.[13]

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[13] *Anderson* refutes the State's claim that there must be record evidence of the ballot labels' tendency to affect voters and candi-

2. The Court has also held that the Elections Clause is not "a source of power to dictate electoral outcomes, *to favor or disfavor a class of candidates*, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-834 (emphasis added).[14] The Label Law falls squarely within that

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dates. Pet. Br. 30 n.40. *Anderson* makes clear that the effect of a ballot label is a question of law for which specific proof is unnecessary. *Cf. Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799-800 (1988) (relying on "predictable result" of compelled disclosure); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 569 (1980) (accepting without empirical evidence the "immediate connection" between advertising and demand). In any event, the self-proclaimed premise of the Label Law is that voters will react to the labels. *See also* Garrett, 85 Va. L. Rev. at 1577-78 ("Because the notation is placed on the official ballot, voters exposed to the misleading information are a captive audience placed in an environment where they ascribe heightened credibility to the information."). As in *Anderson*, moreover, the relevant issue is whether the labels and instructions may tend to influence some voters and candidates, not whether they would necessarily affect every voter and every candidate, or alter the outcome of every election.

[14] Alexander Hamilton rejected the argument that the Elections Clause "might be employed in such a manner as to promote the election of some favorite class of men." *The Federalist No. 60*, at 367 (Clinton Rossiter ed., 1961). Rebutting the claim that the Clause might be used to favor the wealthy, he said that this "forms no part of the power to be conferred * * *. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *Id.* at 371 (emphasis in original). Justice Story, too, saw the impropriety of using the Elections Clause "to promote the election of some favorite candidate." 3 Joseph Story, Commentaries on the Constitution of the United States § 818 (1833). *See Thornton*, 514 U.S. at 833; *Newberry*, 256 U.S. at 255-256; *id.* at 283-284 (Pitney, J., concurring in part); *see also* Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 Cornell L. Rev. 109, 114 (1996) (Elections Clause does not permit States "to substantively discour-

prohibited category of regulations. The intended purpose and obvious effect of the law is to disfavor and handicap a particular class of candidates—those who refuse to follow, or pledge to follow, the term limits instructions. Indeed, the avowed intent of the law is to cause the adoption of a particular constitutional amendment by influencing candidate and voter behavior. *See* Mo. Const. art. VIII, § 15 (expressing "intention that this initiative lead to the adoption of the following U.S. Constitutional Amendment"). Under the Elections Clause, the State may enact evenhanded voting regulations, but it may not place its thumb on the electoral scale so as to help some candidates and hurt others based on the content of their political views.[15]

The labels in question do not simply impart information in a neutral way but rather cast aspersions on candidates because of their stance on a single issue. It is not merely informational to say that a candidate "DISREGARDED" voter instructions—a loaded term connoting disrespect and inattention to the views of the voter who reads it. *See* Webster's Third New International Dictionary ("Webster's") 655 (1986) ("Disregard," means "to treat without fitting respect or attention," "to treat as unworthy of regard or notice," and "to give no thought to" or "pay no attention to"). Indeed, because the label does not say what the "instructions"

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age or interfere with political competition among aspiring participants"); *cf. Miller*, 169 F.3d at 1125-26 (label law "place[s] the state's official stamp of disapproval on a specific group of candidates, namely, those whom the state disfavors because of their views on a single political issue" and hence is "an improper exercise of Nebraska's authority to regulate the content of its ballots").

[15] Significantly, if a *State* has the power under the Elections Clause to use ballot labels in effort to sway an election, *Congress* has the same power. But the Framers plainly could not have intended to give a majority in Congress the power to perpetuate itself in office by damaging political opponents, or non-incumbents generally, with negative ballot labels.

were, it tells each voter that his or her views on term limits have been disrespected regardless of what those views may be. And as the California experience shows, *see supra* at 7-8, to label a candidate as having "DECLINED TO PLEDGE" to support term limits—especially where candidates who *do* take the pledge are *not* labeled—clearly implies that there is something amiss about a politician who has not taken the pledge. *See* Webster's at 586, 1739 ("Decline" means "to refuse to undertake, engage in, or comply with" or "reject, repudiate, [or] spurn," while "pledge" means "assure or promise the performance of" or "promise seriously."). Thus, during the critical moment a Missouri citizen examines the ballot before voting, he or she will see some candidates branded as having treated the citizen's own wishes as unworthy or without the respect or attention they are due, and others branded as having refused to make a serious assurance about a political issue deemed important by the State.

As the Eighth Circuit held, such pejorative labels cannot help but have the intended effect on voters and candidates:

> The labels are phrased in such a way they are likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. * * * Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress. * * * The only "information" the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires. [Pet. App. A9 (citing other label law cases).]

By potentially affecting voters at the instant they vote, such labels threaten a politician's career and livelihood, and thus are as serious a coercive sanction as a fine or other penalty.[16]

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[16] *See also Advisory Opinion to the Attorney General Re Term Limits Pledge*, 718 So. 2d 798, 803 n.3 (Fla. 1998) (label "Broke

The label laws have been rightly denounced as an "extremely dangerous and misleading manipulation of the Federal ballot." 143 Cong. Rec. H462 (Feb. 12, 1997) (statement of Rep. Fowler). *See also id.* at H419 (Feb. 11, 1997) (statement of Rep. McCollum) (such laws "set[ ] a dangerous precedent for manipulation of the Federal ballot by special interest groups"). If the Label Law is upheld, it is not farfetched to think we would soon see congressional candidates being labeled as having, for example, "OPPOSED PROTECTING AMERICAN JOBS" or "VOTED TO CUT BENEFITS FOR SENIORS." One could easily imagine other, more extreme, examples. Under the State's reasoning, such designations would be constitutional and appropriate.

They are not, because they go beyond the State's power to establish neutral election procedures, and instead allow any group that happens to have majority support in a given election to use the State's control over the ballot to determine the issues upon which future federal elections will be waged. Such a proliferation of ballot labels would "radically change the voting process," *Gwadosky*, 966 F. Supp. at 59-60 n.9, and "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 365 (1997). This the Elections Clause plainly forbids. Far from "reinvigorat[ing] American democracy," Pet. Br. 42, the Label Law seeks to corrupt it.[17]

TERM LIMITS pledge" is "obviously intended to be, and would be, a negative comment on the candidate at issue, and would potentially adversely affect that candidate's chances of being elected"); Garrett, 85 Va. L. Rev. at 1576 (label "DISREGARDED VOTERS' INSTRUCTIONS" is "likely to irritate any citizen in the voting booth long before she reads on to discover the precise issue that prompted the lawmaker's disregard," and was drafted "to evoke the strongest possible reaction from voters").

[17] *Ray* v. *Blair*, 343 U.S. 214 (1952), is not to the contrary. *See* Pet. Br. 24-25. In that case, the Court held that a State may permit

3. The Label Law contravenes the Qualifications Clauses, U.S. Const. art. I, § 2, cl. 2, § 3, cl. 3, for largely the same reasons. In *Thornton*, the Court held that the three qualifications for Congress set forth in Article I are exclusive, and that a State may not create additional ones. 514 U.S. at 806. The Court further held that a State may not *indirectly* add qualifications: "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836. This test echoes the Court's ruling that the Elections Clause forbids laws that "favor or disfavor a class of candidates." *Id.* at 833-834.

As the State admits, Pet. Br. 26, the Qualifications Clauses do not merely prevent a State from completely disqualifying candidates who meet the constitutional requirements. The law at issue in *Thornton* did not disqualify any candidate from running or serving, but rather barred candidates' names from appearing on the ballot if they had served in Congress more than a set amount of time. Thus, the petitioners in *Thornton* argued that the law did not add new qualifications, because it did not actually disqualify anyone—any person could still run as a write-in candidate. 514 U.S. at 828. The Court rejected that argument, holding that although the law did not, literally, create new qualifications, it violated the

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a political party to require the party's candidates for the electoral college to pledge to support the party's presidential and vice-presidential nominees as an exercise of the State's constitutional authority under Article II, § 1 to appoint electors in the manner of its choice. 343 U.S. at 227. A State has no comparable power with respect to the election of Members of Congress. Moreover, *Ray* rested on the principle—not applicable here—that political parties have the associational right to determine the qualifications of their own nominees. *See, e.g., id.* at 221-222 (pledge "protects a party from intrusion by those with adverse political principles"), 225, 230. Finally, *Ray* did not decide whether such pledges could be made legally enforceable. *Id.* at 230.

Qualifications Clauses because its intended purpose and effect was to "handicap[ ] a class of candidates." *Id.* at 831.[18]

The Label Law is invalid for the same reasons. *First*, as shown above in connection with the Elections Clause, *supra* at 16-19, the Law "has the likely effect of handicapping a class of candidates," *Thornton*, 514 U.S. at 836—those who will not support the proposed amendment. *Second*, the Law "has the sole purpose of creating additional qualifications indirectly." *Id.* The Law's express intent is to cause the adoption of the proposed amendment, and it seeks to do so by skewing elections against the disfavored class. *See* Mo. Const. art. VIII, § 15; *Thornton*, 514 U.S. at 829-830 (relying on statement of intent in Arkansas law). Thus, as in *Thornton*, the Law indirectly seeks to add a new, non-procedural qualification: support for the amendment. Contrary to the State's contention (Pet. Br. 28), it is immaterial that the State seeks to impose this indirect qualification to achieve another goal: enactment of the amendment. In *Thornton*, the Arkansas law was invalid even though it sought to achieve such ancillary goals as "provid[ing] for the infusion of fresh ideas and new perspectives, and * * * decreas[ing] the likelihood that representatives will lose touch with their constituents." 514 U.S. at 837. So too here, the Label Law's ancillary goal does not justify its intended purpose to achieve that goal by handicapping a disfavored class of candidates.

B. The History of the Constitution Shows that States Have No Delegated Power to Coerce Federal Legislators Through Enforceable Instructions

The State and its *amici* argue at length that history of legislative instructions demonstrates the validity of the Label Law. In fact, history demonstrates just the opposite. The

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[18] Contrary to the State's argument, *see* Pet. Br. 27, in reaching this conclusion in *Thornton*, the Court specifically *disavowed* any reliance on empirical evidence regarding the electoral chances of write-in candidates. 514 U.S. at 536.

idea that a State can issue legal commands to sitting or future Members of Congress, backed up by a coercive enforcement mechanism, is contrary to the history and fundamental principles of our constitutional system. This case is not about the right of the "people" to make their views known through advisory referenda or similar communications. It is, instead, about the effort of a state government to use its control over the ballot to cause federal representatives to support State-favored legislation. Far from supporting such a law, the history of the Constitution manifestly condemns it.

1. The Rejection of a "Right to Instruct"

In 1789, during the First Congress's drafting of the Bill of Rights, a proposal was made to include in what would become the First Amendment the right of the people "to instruct their Representatives." 1 Annals of Congress ("Annals") 761 (Joseph Gales ed., 1789). After much debate, the proposal was soundly defeated by a vote of 41-10. *Id.* at 776.[19] Contrary to the claims of Professor Kobach, *see* Kobach Br. 19-22, this proposal was not rejected because it was understood that a right to issue enforceable instructions already existed, but because Representatives (including prominent Framers such as James Madison and Roger Sherman) understood that such a right was contrary to the fundamental principles of the new Constitution. *See Bowsher* v. *Synar*, 478 U.S. 714, 723 (1986) (First Congress's actions are " 'contemporaneous and weighty evidence' of the Constitution's meaning").

Madison was strongly opposed to creating a right to instruct, arguing that it would be "of a doubtful, if not of a dangerous nature." 1 Annals at 767. He explained that if the right meant only that "the people have a right to express and

[19] Measured by reported text, the debate on this proposal lasted perhaps ten times longer than the debate on any other proposed provision of the First Amendment. A similar proposal failed in the Senate by a 14-2 vote, *see* Senate Journal 70 (Sept. 3, 1789), but there is no record of the debate in the Senate.

communicate their sentiments and wishes, we have provided for it already" in what would become the First Amendment. *Id.* at 766. But, he continued, "[i]f gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions, *the declaration is not true*," and such a right "obliges us to *run the risk of losing the whole system*." *Id.* at 766, 767 (emphases added). "Suppose," Madison asked, a representative "is instructed to patronize certain measures, and from circumstances known to him, but not to his constituents, he is convinced that they will endanger the public good; is he obliged to sacrifice his own judgment to them?" *Id.* at 766.

It is thus evident that Madison viewed a right to issue enforceable instructions as inconsistent with a major goal of representative democracy—to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *The Federalist No. 10*, at 82 (Madison). In fact, during the Constitutional Convention, Madison (and James Wilson) successfully opposed a proposal that would have permitted state legislatures to appoint representatives to Congress, saying that if the legislatures have the power to appoint "they will instruct, and thereby embarrass the Delegate—*not so if the Election is by the people*." 1 The Records of the Federal Convention of 1787, at 367 (Max Farrand ed., 1966) ("Farrand") (emphasis added). Madison thus believed that popularly elected representatives could *not* be instructed.

Roger Sherman also forcefully opposed the proposal to create a right to instruct. For him, the idea was at odds with Congress's role as a deliberative body comprised of representatives open to persuasion and compromise and serving not merely the narrow interests of a few, but the common good of the Nation. These were his words:

> [*T*]*he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting.* I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him. From hence I think it may be fairly inferred, that the right of the people to consult for the common good can go no further than to petition the Legislature, or apply for a redress of grievances. It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support. Should his instructions, therefore, coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them. [1 Annals at 763-764 (emphasis added).]

Many others also spoke out against the proposed right, likewise making clear that it would subvert the principles of the Constitution. George Clymer of Pennsylvania, another Framer, declared that a right to issue enforceable instructions would be "a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments" and would "render[ ] Congress a mere passive machine." *Id.* at 763. Maryland's Thomas Stone said that such a right would be "subversive of the principles of the constitution" and "change the Government entirely." *Id.* at 767-768. He added that this was "a power not to be found in any part of

the earth except among the Swiss cantons" and that "here we have a different form of Government." *Id.* at 768.[20]

The rejection of the right to instruct confirmed that the Framers intended for Congress to be a deliberative body in which representatives, while mindful of their local constituency, meet to debate and legislate in the *national* interest. *See INS* v. *Chadha*, 462 U.S. 919, 959 (1983) ("The records of the Convention and debates in the states preceding ratification * * * [show an] unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process").[21] The Constitution established a *representative* democracy—a system that gives the people the power, not to make the laws themselves, but to elect those who do. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *cf. id.* art. IV, § 4, cl. 1 (guaranteeing "a Republican Form of Government"). As the debates of the First Congress make clear, "[i]nstruction would have completely undermined the Madisonian system of deliberation among refined representatives." Akhil Reed

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[20] *See also* 1 Annals at 762 ("[W]ere all the members to take their seats in order to obey instructions, and those instructions were as various as it is probable they would be, what possibility would there exist of so accommodating each to the other as to produce any act whatever?") (statement of Rep. Hartley); *id.* at 764 ("Let the people consult and give their opinion; let the representative judge of it: and if it is just, let him govern himself by it as a good member ought to do; but if it is otherwise, let him have it in his power to reject their advice.") (statement of Rep. Jackson); *id* at 772 ("Instructions have frequently been given to the representatives of the United States; but the people did not claim as a right that they should have any obligation upon the representatives; it is not right that they should.") (statement of Rep. Wadsworth).

[21] Ensuring deliberation is one reason why the Constitution requires the Members of Congress to gather together in person. *See* U.S. Const. art. I, § 4, cl. 2.

Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1154 (1991). Or as Noah Webster put it at the time, instructions "subvert the very principles of republican government" because "[t]hey make the opinions of a small part of the state a rule for the whole—they imply a decision of a question, before it is heard—[and] they reduce a Representative to a mere machine, by restraining the exercise of his reason." Noah Webster, *Government*, The American Magazine 204, 207 (Mar. 1788) (writing as "Giles Hickory").[22]

As the 1997 experience in Congress demonstrates, the Label Law is fundamentally inconsistent with these principles of deliberative, representative democracy. The label laws' legal commands to representatives, enforced through coercive ballot labels, prevented them from deliberating and compromising to enact legislation according to their views of the national interest. In the words of Roger Sherman, the laws "destroy[ed] the object of their meeting." 1 Annals at 763. The rejection by the Framers and their contemporaries of the right to instruct was a wholesale rejection of the idea that the Constitution gives the States the power to coerce the actions of federal legislators through enforceable legal commands like those at issue here. *See Miller*, 169 F.3d at 1124.

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[22] *See also* Amar, 100 Yale L.J. at 1154-55 ("all of Madison's central arguments in *The Federalist* No. 10 are premised on a repudiation of the idea of instruction"); Cass R. Sunstein, Democracy and the Problem of Free Speech 242 (1993) ("For the founding generation, a right to instruct was thought to be inconsistent with the point of meeting, which was deliberation."); Thomas E. Cronin, Direct Democracy 25 (1989); Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 591 n.51 (1996); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 172 (1995); George F. Will, *Save Us From the Purists*, Newsweek, Feb. 17, 1997, at 76 (label laws are "pernicious" and a "device that degrades what the [term limits] movement seeks to dignify—the principle of deliberative representation").

2. Pre-Constitutional History Does Not Support the Validity of the Label Law

The State and its *amici* attempt to defend the Label Law with historical evidence of constituents instructing legislators in this country. *See, e.g.*, Pet. Br. 10-17; Kobach Br. 4-19. The history they rely on, however, is not up to the task.

To begin with, in all the history they recount, there is *no* example of any instruction comparable to the Label Law—that is, an instruction framed as a formal legal command and enforced through coercive sanctions imposed by the government through its control over the ballot. *See* Kobach Br. 5 ("no formal legal mechanism compelled the [colonial legislator] to obey his instructions"); Pet. Br. 14 n.13 (no history of labels being used to enforce instructions). The one example we have of a proposal to give instructions the force of law is the *rejected* proposal to include a right to instruct in the First Amendment. The State and Professor Kobach argue that early instructions needed no enforcement because "no self respecting member of Congress" would have ignored them, Pet. Br. 14 n.13, and because the political culture of the time made them "de facto binding." Kobach Br. 5, 15, 23. The fact remains, however, that the Label Law is quite different from the historical instructions. It is one thing to receive an instruction and choose to follow it; it is quite another for the instruction to be codified as a legal command and given a government-imposed sanction for its violation.[23]

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[23] An example cited by Professor Kobach proves the point. Delaware's delegates to the Constitutional Convention had been instructed not to vote for any constitution denying the States equal representation in Congress. *See* Kobach Br. 10. But the ability of delegates to compromise on that point—through the establishment of the House and the Senate—was a critical factor in the creation of the Nation. Had Delaware's delegates been under a legal command, or had they faced governmental retribution for failing to follow that command, there might never have been a Constitution.

Just as importantly, examples of instructions prior to the Framing prove nothing, for, as noted above, the Framers rejected such instructions as incompatible with the new system of a deliberative, representative Congress that would act in the national interest. *See* Cronin, *supra*, at 24 ("Not until the late 1780s did Americans begin to challenge the doctrine of binding instructions. Hamilton and Madison led the charge."). A central weakness of the Articles of Confederation—which the Constitution was intended to overcome—was the lack of a truly national legislature in which representatives could enact laws in the national interest free from the threat of recall by their States. As one Senator noted in 1858, the practice of instructions

> had its origin * * * under the Confederation, when the States not only claimed, but had the power, to instruct their representatives in Congress, and to recall them too, they being nothing more than [a]mbassadors from independent sovereignties attending a general Congress of the States. * * * This doctrine, so far from having any support in the Constitution, in my judgment is directly at war both with the spirit and literal provisions of the Constitution. [Cong. Globe, 35th Cong., Spec. Sess. of the Senate 805 (1858) (statement of Sen. Bell).]

Thus, it is not surprising that neither the State nor its *amici* point to a single instance of an instruction issued to popularly elected federal representatives after the Framing.[24]

The practice of instructions prior to the Framing had considerable opposition—including by some of the most influential statesmen of the day. Perhaps the most famous expression of opposition can be found in a 1774 speech delivered by Edmund Burke to his Bristol constituents. Burke said that although a representative should heed his constituents' views, he "owes you, not his industry only, but his judgment; and he

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[24] The practice of State legislatures instructing Senators whom they selected raises separate issues. *See infra* at 30-31.

betrays, instead of serving you, if he sacrifices it to your opinion." 1 The Founders' Constitution 392 (Philip B. Kurland & Ralph Lerner eds., 1987). As he stated, legislation is a matter of reason, "and what sort of reason is that, in which the determination precedes the discussion [and] in which one set of men deliberate, and another decide." *Id.* Burke thus rejected "*authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience." *Id.* (emphasis in original).

Reflecting the Burkean view, many of the Framers expressed the view that States had no right to instruct Members of Congress. *Cf.* Russell Kirk, The Conservative Constitution ix-x, 82-89, 94-95 (1990) (describing Burke's influence on the Framers and the Constitution); Cronin, *supra*, at 28 (same). Madison's views are made clear by his remarks in the First Congress and in *The Federalist*. *See supra* at 22-23. In 1786, George Washington likewise objected that legal commands to national representatives would impair deliberation. As he stated, in national matters "the *sense*, but not the *Law* of the District may be given, leaving the Delegates to judge from the nature of the case and the evidence before them." 1 Founders' Constitution 399 (emphasis in original). John Adams believed that States had no right to instruct federal representatives even in a purely advisory capacity: "Upon principle, I see no right in our Senate and House to dictate, nor to advise, nor to request our representatives in Congress." Letter to J.B. Varnum, Dec. 26, 1808, in 9 The Works of John Adams 605 (Charles F. Adams ed., 1969).[25]

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[25] Although Alexander Hamilton stated in passing during New York's ratifying convention that the people "have it in their power to instruct their representatives," he also said that "[t]here are certain conjunctures, when it may be necessary and proper [for a legislator] to disregard the opinions which the majority of the people have formed." 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 252 (2d

Finally, in 1788, Patrick Henry, a proponent of instruction, spoke against the proposed Constitution during the Virginia ratifying convention on the ground that instructions to federal legislators could *not* be enforced: "[C]an you in this government recall your senators? Or can you instruct them? You cannot recall them. You may instruct them, and offer your opinions; but if they think them improper, they may disregard them." 3 Elliot's Debates at 355. As he stated, "[d]elegates may be called and instructed under the present system, but not by the new Constitution." *Id.* at 354.

3. Post-Constitutional History Does Not Support the Validity of the Label Law

As the State and its *amici* note, prior to the popular election of Senators, some State legislatures issued non-binding instructions to the Senators they selected. *See, e.g.*, Pet. Br. 13; Kobach Br. 17. But this practice—which declined after 1840 and was "obsolete" by 1860, Cronin, *supra*, at 26—says nothing about the proper interpretation of the Constitution. *See Thornton*, 514 U.S. at 823 ("One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States."). Indeed, the constitutionality of the practice was never determined, *see* Levmore, 82 Va. L. Rev. at 592 & n.54; Currie, *supra*, at 173; and it was always controversial and far from universally accepted. *See* Roy Swanstrom, *The United States Senate 1787-1801*, S. Doc. No. 87-64, at 171 (1961) ("in these precedent-making days [1789-1801] there was no unanimity of sentiment on the question of" state

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ed. 1836) ("Elliot's Debates"). The latter view is more in line with his writings as *Publius*. *See The Federalist No. 71*, at 432 ("When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.").

instructions to Senators); Vik D. Amar, *The Senate and the Constitution*, 97 Yale L.J. 1111, 1117 n.32 (1988).[26]

But even if this practice bore on the meaning of the Constitution, it says nothing about the validity of the Label Law. Prior to the Seventeenth Amendment, instructions by legislatures to the Senators they chose were "widely regarded as a logical concomitant of the concept that the Senate was the special representative of the sovereignty left to the States." Swanstrom, *supra*, at 160. *See also* William E. Dodd, *The Principle of Instructing United States Senators*, 1 S. Atlantic Q. 326, 327 (1902). It is one thing for a legislature to make its current views known to the individuals it alone selects; it is quite another for a state government to use its control over the ballot to enforce outdated legal commands imposed on *popularly elected* representatives, including House members who represent a single District rather than the entire State.

The State and its *amici* also rely on state laws—some of which had ballot label provisions—regarding the selection of Senators prior to the Seventeenth Amendment. *See* Pet. Br. 14-16; Missouri Term Limits Br. 14-18; Nebraska Br. 17-20. These Twentieth Century laws have no bearing on the interpretation of the Constitution. *See Thornton*, 514 U.S. at 826-827 n.41 ("[A]s one moves away from 1789, it seems to us that state practice is even less indicative of the Framers' understanding of state power."). It is not true, however, that

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[26] In the First Congress, North Carolina's Senators refused to obey instructions given them, as did one of Maryland's. *See* Swanstrom, *supra*, at 162-165, 169. To Ralph Izard of South Carolina, "legislatures had no more right to instruct Senators than electors had to instruct the President," *id.* at 169, while Oliver Ellsworth of Connecticut said that instructions "amounted to no more than a wish, and ought to be no further regarded." Journal of William Maclay 399 (Edgar S. Maclay ed., 1890). *See also supra* at 28; 30 Annals of Congress 577 (1817) (statement of Rep. John C. Calhoun) ("I too * * * am an advocate for instruction. I am instructed. The Constitution is my letter of instruction.").

the Label Law is "indistinguishable" from these laws. Missouri Term Limits Br. 14-15. The cited laws were entirely permissive—candidates were *allowed* but not *required* to take a pledge or carry a ballot label—and the laws contained neither instructions nor "DISREGARDED INSTRUCTIONS" labels. *See id.* at 14-18, 1a-4a. Moreover, the laws (1) involved only elections for *state* office—thus the Elections Clause, the Qualifications Clauses, the Speech or Debate Clause, and Article V did not apply to them; and (2) existed before the First Amendment was incorporated against the States, *see McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995). Finally, one state court struck down a *mandatory* pledge law on state constitutional grounds. *See State ex rel. McCue* v. *Blaisdell*, 118 N.W. 141, 144-145 (N.D. 1908).[27]

4. The Label Law Violates Principles of Federalism

The history recounted above demonstrates that the Constitution was not intended to confer upon the States the power to use their control over the ballot to coerce federal legislative debate through enforceable instructions. Indeed, principles of federalism negate any such power. The Court has held that Congress may not "commandeer" state officers—including state legislators—into enforcing a program or enacting a law to serve a federal agenda. *Printz* v. *United*

[27] The State and its *amici* also note that some States sought to bind delegates to conventions called to consider ratification of the Twenty-First Amendment. *See* Pet. Br. 17; Kobach Br. 18-19; Missouri Term Limits Br. 18-21; Nebraska Br. 15-17. Assuming *arguendo* that a State has broad power to structure and regulate its own convention, including the selection and conduct of convention delegates, *see In re Opinion of the Justices*, 148 So. 107, 110 (Ala. 1933), a State surely has no comparable power over the election or acts of Members of Congress, who are federal officers beyond a State's control. Moreover, these laws are not content-based—they simply require a delegate to disclose the way he or she will vote on the *only* issue to be considered at the ratifying convention.

States, 521 U.S. 898, 925 (1997); *New York* v. *United States*, 505 U.S. 144, 161 (1992). The federal government therefore may not "require the States to govern *according to Congress' instructions*." *Id.* at 162 (emphasis added).

Of course, the principle also works the other way and forbids States from issuing directives to federal legislators. As the Court explained in *Printz*:

> It is no more compatible with this independence and autonomy [of States] that their officers be "dragooned" * * * into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws. [521 U.S. at 928.[28]]

The conscription of federal officers into state service is, however, exactly what Missouri has attempted here. The State has ordered each federal legislator from Missouri, on penalty of a negative ballot label, to use all of his or her authority to enact the State's proposed term limits amendment. This is a clear violation of "the independence and autonomy of the United States." *Id.* *See Opinion of the Justices*, 673 A.2d at 696 (instruction on term limits invalid because "neither the electors of the State of Maine nor the Legislature of the State of Maine may control the state's delegates to the United States Congress in the performance of their congressional duties. Such an exercise of control would violate the essence of federalism.").

Under the Constitution—unlike the Articles of Confederation—Members of Congress are not mere envoys or emissaries of the State from which they come, but are, first and foremost, federal officers:

[28] *See also Thornton*, 514 U.S. at 841 (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable * * * as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.").

> In th[e] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, *nor controllable by, the states* * * *." [*Thornton*, 514 U.S. at 803 (quoting 1 Story, *supra*, § 627) (emphasis added).[29]]

The historical record is clear that while federal representatives must obviously pay heed to the expressed wishes of their constituents, they must also have the ability to determine for themselves, free from state government coercion, how they will vote in the national interest.

II. THE LABEL LAW VIOLATES THE FIRST AMENDMENT

The Label Law regulates core political speech of candidates and legislators in both a content- and viewpoint-based manner. The Law compels candidates to express views on one, and only one, issue; it compels legislators to vote in a certain way; and it punishes with pejorative labels those who fail to support the State's favored view. Missouri has thus used its control over the ballot to advance one side of a political debate in an effort to sway the outcome of elections. As shown below, the First Amendment was intended precisely to prohibit such heavy-handed governmental interference with the free flow of political discourse.

A. The Label Law is Subject to Strict Scrutiny

The State contends that the Label Law is not subject to the First Amendment because it involves only the "behavior" of

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[29] That Members of Congress do not "owe their allegiance" to the States is shown by the facts that their salaries are paid for out of the Treasury, *Thornton*, 514 U.S. at 804, and that the Framers rejected a proposal allowing States to recall their representatives, *see id.* at 810 n.20; *cf.* Articles of Confederation, art. V.

voting, and of taking (or not taking) a pledge. *See* Pet. Br. 32-33. This argument cannot be taken seriously. The Law labels non-incumbent candidates according to whether they take a "pledge," and reciting a pledge is, of course, a classic form of speech. *See West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). Furthermore, the Law instructs incumbents to vote in favor of the proposed constitutional amendment. Voting by legislators—like all of the other legislative activities compelled by the Label Law—is plainly an expression of political opinion protected by the First Amendment.[30]

The Label Law is subject to the First Amendment because it compels speech. The First Amendment prohibits a State from forcing a person to speak publicly, *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985), or to respond to the views of others, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11 (1986). The Court has therefore held that compelled disclosures by political candidates face exacting scrutiny. *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). And "[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991).

Through the mechanism of the pledge, the Label Law forces candidates publicly to express views—one way or the other—on the proposed term limits amendment, and only that issue, to 100% of the voters at the very moment they cast

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[30] *See Bond* v. *Floyd*, 385 U.S. 116, 135-136 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); *Stella* v. *Kelley*, 63 F.3d 71, 75-76 (1st Cir. 1995) ("beyond serious question" that voting by public officials "comes within the heartland of First Amendment doctrine"); *Clarke* v. *United States*, 886 F.2d 404, 411 (D.C. Cir. 1989) (" 'we have no difficulty ' " concluding the same) (citation omitted), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc). *Cf. Spallone* v. *United States*, 493 U.S. 265, 274 (1990).

their ballots. And the Law expressly compels—indeed, instructs—representatives to speak in certain ways. The Label Law thus plainly compels speech, with the effect of distorting the content of campaigns and legislative activities, and the conduct of voters. A candidate may wish to base his or her campaign on numerous issues—none of which involves term limits—yet, when a voter enters the ballot box, term limits will be the *only* issue upon which any candidate's purported views are shown. By requiring candidates to express a view on a single issue to all of the voters, the Label Law impermissibly "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas*, 475 U.S. at 9. *See also Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) (government "may not select which issues are worth discussing or debating in public facilities").

The Law also compels speech because its labels force candidates to advertise a message selected by the State. *See Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). The Law not only compels candidates to speak on a given topic, but it forces them to use words written by the State. The State argues that "nothing in [the labels'] placement or content suggests that the message is the candidate's own," Pet. Br. 32, but the same might have been said of the license plates at issue in *Wooley*. It would be inconceivable to argue that the First Amendment would permit the State to force candidates who oppose a constitutional amendment to ban flag burning to identify themselves, and then post a sign outside their homes saying "I OPPOSE PROTECTING THE FLAG." But that is exactly the kind of speech the Label Law compels.

Finally, the Label Law is also subject to the First Amendment because it uses the State's ballot monopoly to penalize candidates for their failure to endorse the State's favored position. The Law uses pejorative labels to punish candidates who disagree with the State, and to coerce the support of those who remain ambivalent or undecided. *See supra* at 16-19. This contravenes the core right of individuals to

speak freely about matters of public concern without fear of subsequent government retribution. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940). As the Court has held, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977). Contrary to the State's assertion, the Label Law does not simply "comment" on candidates. Pet. Br. 30. In this context, the State is not just one of many voices commenting on issues in the public arena. Rather, the State has used its sole control over the ballot—a power unavailable to others—to influence both candidate and voter behavior on a single issue through negative labels seen by all voters just before they cast their ballots. *Cf. Anderson* v. *Martin*, 375 U.S. 399.

The State nevertheless contends that even if the Label Law affects speech, it is subject not to strict scrutiny but rather to a balancing test applied to neutral election regulations such as filing fees and deadlines.[31] The State is wrong. In *McIntyre* v. *Ohio Elections Commission*, *supra*, the Court invalidated a law compelling individuals to place their names on any written material intended to influence voters. Rejecting the cases relied on by the State here, the Court held that the law warranted strict scrutiny because it was not "an ordinary election restriction," as it did "not control the mechanics of the electoral process." 514 U.S. at 345-346. *See also Burdick*, 504 U.S. at 438 (ballot access cases involve "reasonable, politically neutral" regulations).

The Label Law warrants strict scrutiny under this standard because, as explained above in connection with the Elections

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[31] *See, e.g., Burdick* v. *Takushi*, 504 U.S. 428 (1992); *Tashjian* v. *Republican Party*, 479 U.S. 208 (1986); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Storer* v. *Brown*, 415 U.S. 724 (1974); Pet. Br. 35-36, 39.

Clause, it is it is not a neutral regulation of the mechanics of elections, but rather is content- and viewpoint-based. *See supra* at 12-15. Content-based speech regulations are subject to strict scrutiny,[32] and are "presumptively invalid." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). The Label Law is content-based because it singles out speech on a particular subject matter—the proposed term limits amendment—and only that subject matter. *See McIntyre*, 514 U.S. at 345; *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533-535 (1980). The Law, in fact, is even more objectionable. Under the First Amendment, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 829 (1995). Such viewpoint discrimination is a particularly egregious form of content discrimination. *Id.* The Label Law is viewpoint-based, because it seeks to advance a particular substantive position. It would be bad enough if the State merely singled out term limits as the only issue upon which candidates could express their views on the ballot; it is far worse for the State to pick only one side of the issue and pejoratively label only those who disagree with that position. Unlike the disclosure law considered in *McIntyre*, which "applie[d] evenhandedly to advocates of differing viewpoints," 514 U.S. at 345, the Label Law does not label those candidates who support the State's position.

Viewpoint-based laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994). That is exactly what the Label Law does. The State's express

[32] *See United States* v. *Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000); *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

intent is to cause the adoption of the proposed amendment and, to realize this goal, it uses its control over the ballot to tar only those who oppose it with negative labels designed to harm their electoral chances if they run at all.

For all these reasons, the Label Law warrants strict scrutiny, which, as shown below, it cannot withstand.

B. The Label Law Cannot Withstand Strict Scrutiny

The Label Law operates in an area—political speech—where the First Amendment is "at its zenith." *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988). Because the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), the State's burden to sustain the Label Law "is well-nigh insurmountable." *Meyer*, 486 U.S. at 425.[33] The State has not surmounted that burden. To satisfy strict scrutiny, a law "must be narrowly tailored to promote a compelling Government interest." *Playboy*, 120 S. Ct. at 1886. The Label Law is not.

The State first contends that the Label Law serves the interest of the "people" in "preserving their voice in government." Pet. Br. 38. While there is nothing wrong with preserving the legitimate "voice" of the "people" in government, the Label Law has nothing to do with that interest. The people of Missouri may express their views through the electoral process, and through their right to petition their representatives. The Label Law, however, is an attempt by the *government* of Missouri to cause the enactment of federal legislation by using its control over the ballot to coerce and penalize those who oppose it. *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 295 (1981) ("[T]the voters

[33] *See also Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982); *Buckley*, 424 U.S. at 52-53; *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."). Such an objective is anathema to the core values of the First Amendment. Moreover, this Court has rejected a claimed right to "us[e] the ballot to communicate to the public" and "to send a particularized message" to the voters. *Timmons*, 520 U.S. at 362, 363. As the Court held, "[b]allots serve primarily to elect candidates, not as forums for political expression." *Id.* *See Georges* v. *Carney*, 691 F.2d 297, 301 (7th Cir. 1982) (ballot is "not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate to vote up or down").

The State next asserts that the Label Law furthers the voters' right to receive information about candidates. Pet. Br. 39. But the State has no compelling interest in singling out for the voters only *one* issue, much less in handicapping candidates who disagree with the State's favored position. *See* Pet. App. A13. Indeed, the Court has held that the interest of educating voters does not even justify a content-neutral ballot regulation dealing with the time for filing candidacy petitions. *Anderson* v. *Celebrezze*, 460 U.S. at 796-798. As the Court held, the First Amendment "reflect[s] a greater faith in the ability of individual voters to inform *themselves* about campaign issues." *Id.* at 797 (emphasis supplied). In fact, the Label Law *disserves* the voter's interest in receiving information, because it dissuades term limits opponents from entering the marketplace of ideas.

Nor is there a compelling interest in forcing candidates to speak on an issue upon which they have not decided to campaign. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348. That is because the First Amendment "mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-791.

Even if the State had a compelling interest in informing the voters *only* about term limits, the Label Law is not narrowly tailored to promote that interest because its labels are inaccurate and misleading. *First*, the "voters" whose "instructions" an incumbent candidate has purportedly "disregarded" only represented a majority of statewide initiative voters in 1996. As the State admits, "[t]he voters in subsequent years might have a different political view," Pet. Br. 21, yet the Label Law continues until its goal has been attained. *Second*, the Law will label a candidate as having "disregarded" the voters' instructions even if a majority of voters in his or her congressional district actually *opposes* term limits. *See id.* (noting that 28 counties failed to support Label Law). *Third*, the Law will brand as opposing term limits a candidate who *supports* term limits, but not the particular form of them prescribed in the proposed constitutional amendment. Pet. App. A12 n.7, A14; *supra* at 9. *Fourth*, the labels in fact provide little, if any, useful information, as neither label tells the voter what the pledge said or what the instructions were.[34]

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[34] The Label Law is also unconstitutionally vague. *See* Gralike Ct. App. Br. 45-49. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The Label Law fails this "strict" test. *Id.* at 432. Petitioner, who decides if candidates will be labeled, *admitted* that the Law provides "no guidance" and puts her in an "untenable position" on a number of issues. J.A. 60, 51; *see* J.A. 61-65. She also voted against the law because it did not provide adequate guidance. J.A. 50. Indeed, her office unsuccessfully sought clarifying legislation, J.A. 34-35, and Colorado Representatives likewise found it necessary to obtain the state Attorney General's opinion on how to comply with Colorado's label law. 143 Cong. Rec. H488 (Feb. 12, 1997). The Label Law thus "impermissibly delegates basic policy matters * * * for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The potential for political abuse here is great, as the Label Law would

The State also argues that the Label Law only minimally impacts First Amendment rights because so long as a candidate follows the voting instructions or takes the pledge, she is free to say anything else about term limits without incurring a sanction, and may even "disassociate herself from these actions." Pet. Br. 37; *see id.* at 33 & n.43. A law that impairs free expression, however, cannot pass muster on the theory that other opportunities for speech remain. *See, e.g., California Democratic Party*, 120 S. Ct. at 2412 ("We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.") (citation omitted). Nor can an otherwise impermissible compulsion of speech be sustained on the view that the speaker can disavow the message. It would be no answer to say to the motorists in *Wooley* that they can apply a bumper sticker disagreeing with the motto on their license plate, or to the parading veterans in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), that they can explain after the march why they did not want a group of gay Bostonians to join them.

In fact, a central vice of the Label Law is that candidates have *no* opportunity to express contrary views or disassociate themselves from the labels after the voters see them. Not only do candidates lack the ability to express a contrary message on the ballot, but in Missouri (like many States) they are forbidden to deliver a message to voters anywhere near the ballot box on election day. *See* Mo. Rev. Stat. § 115.637(18). The State thus intrudes inside the ballot box—the place where its coercion will be most effective—while preventing candidates from countering that effect. *See*

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have an elected official from one political party determining, with minimal guidance, whether members of other political parties should receive pejorative ballot labels based on their political views. And the Law's biased review provisions, *see supra* at 5, would give ample cover for any politically motivated decision.

Riley, 487 U.S. at 800 (compelled disclosure invalid where individual "will not likely be given a chance to explain" it).

Finally, the Label Law is not narrowly tailored because there are less restrictive alternatives for achieving the State's asserted interests. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 329 (1988). There are a host of ways the State could inform the electorate about candidate's positions without violating the First Amendment. It could sponsor voluntary debates. It could publish a pamphlet for voters containing statements by candidates, without requiring a candidate to submit a statement or restricting the issues covered. *See, e.g.*, Cal. Elec. Code § 13307; N.J. Stat. Ann. 19:44A-37. Or it could leave space on the ballot for candidates to express a brief message of their choosing. If the goal of the Label Law were truly to educate the electorate—rather than to coerce candidates and voters—it would have employed one of these means instead. *See R.A.V.*, 505 U.S. at 395 (existence of content-neutral alternatives "cast[s] considerable doubt on the government's protestations that 'the asserted justification is in fact an accurate description of the purpose and effect of the law' ") (quoting *Burson*, 504 U.S. at 213).

III. THE LABEL LAW VIOLATES THE SPEECH or DEBATE CLAUSE

The Label Law is a facial violation of the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The State does not dispute that the Law targets core legislative activity within the ambit of the Clause.[35] The Law

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[35] *See, e.g., Gravel* v. *United States*, 408 U.S. 606, 624, 625 (1972) (Clause protects "voting by Members" and anything else that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings * * * ."); *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1880) (Clause protects not only "words spoken in debate" but also

"instructs" Members of Congress to use "all of [their] delegated powers to pass" the proposed amendment, and asks non-incumbent candidates to pledge to follow that instruction. Mo. Const. art. VIII, § 17. And it directly intrudes upon the legislative process by, for example, requiring a legislator to "second the proposed [amendment] if it lacks for a second" and to "reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of the proposed [amendment]." *Id.* § 17(2)(b), (e).

Instead, the State argues that the Speech or Debate Clause does not apply here because it protects legislators only against prosecution or its equivalent. Pet. Br. 44. The State's own recitation of the governing law belies its argument. As the State notes (*id.* at 43), the "fundamental purpose" of the Clause is to "free[ ] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618.[36] The Label Law plainly imposes both executive and judicial oversight that "realistically threatens" to control legislative conduct. It dictates the content of legislative activity as a matter of Missouri law—on penalty of a negative ballot label—and is expressly intended to coerce that activity. The labels are affixed by the state executive—the Secretary of State—after she has audited representatives' actions in Congress. And the Law provides for judicial proceedings, in which a legislator who seeks to avoid a label will have to explain and justify his or her legislative activities, including in suits brought by any dissatisfied voter.

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anything "done in a session of the House by one of its members in relation to the business before it").

[36] The State does not, and cannot, dispute that the Clause prevents interference from both federal and state governments. *See, e.g.*, *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979) (applying Clause to state court civil action); *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408 (D.C. Cir. 1995) (same).

The Speech or Debate Clause does not simply provide an immunity from prosecution or judicial proceedings. The Clause was directly modeled after the corresponding privilege accorded Members of Parliament in England. *See United States* v. *Johnson*, 383 U.S. 169, 177-178 (1966). That English privilege, in turn, was enacted in response to varied threats by the sovereign against legislative independence, including such actions as "issuing direct orders to the Speaker to cease debate on sensitive topics" and "spreading rumors of royal displeasure and threats of retaliation." Robert J. Reinstein & Harvey L. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1127 (1973). *See also* Carl Wittke, The History of English Parliamentary Privilege 26-27 (1970) (noting royal orders directing Parliament not to discuss certain issues).

The language of the Clause also makes clear that it does not apply only to court proceedings. As codified, the English privilege provided "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M. Sess. 2, ch. 2 (1689). This language was carried forward almost verbatim in the penultimate version of the Constitution, which provided that "Freedom of speech and debate in the Legislature shall not be impeached or questioned *in any Court or place* out of the Legislature." 2 Farrand at 254 n.14 (emphasis added). The Committee of Style made non-substantive changes to this language, including collapsing "any Court or place" to "any other place." *Id.* at 593. Thus, the Clause was intended to protect legislators not only from judicial process, but from interference by the executive in "any other place" outside of Congress.

The Label Law, which directs the state executive (and, ultimately, the judiciary) to audit and penalize legislative behavior, plainly violates that language. The Clause must be read "broadly to effectuate its purposes." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Its

"central role" is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel*, 408 U.S. at 617.[37] Thus, the Court has held that the principles of the Clause prevent instructions to a legislator to vote in a particular way. In *Spallone* v. *United States*, 493 U.S. 265 (1990), the Court invalidated an order directing local legislators to vote in favor of certain legislation, on penalty of contempt sanctions. Although the Court did so on equitable grounds, its decision was "informed" by considerations underlying the legislative immunity doctrine, *id.* at 278, which is co-extensive with the protections of the Speech or Debate Clause, *see Consumers Union*, 446 U.S. at 732-733. As the Court held, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." 493 U.S. at 279. Coercing legislators to vote through a threat of fines contravened this principle because such coercion was "designed to cause them to vote, not with a view to the interests of their constituents or of the city, but with a view solely to their own personal interests." *Id.*

The Label Law contravenes the Speech or Debate Clause for the same reason. Under the Law, the "intimidation of legislators by the Executive," *Gravel*, 408 U.S. at 617, is direct and severe. The Law—like the early royal edicts the

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[37] *See also Supreme Court of Va.* v. *Consumers Union of the U.S.*, 446 U.S. 719, 731 (1980) (Clause "insure[s] that the legislative function * * * may be performed independently without fear of outside interference"); *Eastland*, 421 U.S. at 502 (same); *United States* v. *Brewster*, 408 U.S. 501, 507 (1972) (purpose is to "protect the integrity of the legislative process by insuring the independence of individual legislators"); 1 The Works of James Wilson 421 (Robert Green McCloskey ed. 1967) ("[I]t is indispensably necessary, that [a legislator] should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.").

original English privilege was intended to combat—expressly "instructs" legislators how to vote and conduct other legislative activities, and establishes state-imposed penalties intended to accomplish that result. Not surprisingly, the various label laws had a palpable effect on the behavior of Members of Congress during the short time the laws were in effect. *See supra* at 8-11. It is thus of no moment that the State enforces its instructions by using its ballot monopoly to impose a misleading and negative ballot label, rather than by fines or imprisonment. The purpose of legislative immunity is to render "[l]egislators * * * immune from deterrents to the uninhibited discharge of their legislative duty." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). Because it uses legal sanctions to coerce representatives to vote according to the purported wishes of a majority of statewide initiative voters in 1996, the Label Law is plainly such a prohibited deterrent.

IV. THE LABEL LAW CONTRAVENES ARTICLE V

As every court to have ruled on the issue has held, coercing federal legislators into proposing a constitutional amendment contravenes Article V of the Constitution. Under Article V, the function of proposing amendments is given exclusively to deliberative, representative bodies—Congress and state legislatures. The Label Law, which uses legal commands and sanctions to cause Congress to propose an amendment, impermissibly circumvents that lawful process.

Article V assigns specific roles to various constitutional actors—and no role to some. Congress may propose amendments. State legislatures may ratify amendments, and may also compel Congress to call a national Convention for proposing amendments. Yet not every actor has a direct role in the process; the President, for example, has none. *See Hawke* v. *Smith*, 253 U.S. 221, 229-230 (1920); *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798). The people, too, have a defined role to play: Congress may direct that an amendment be ratified "by conventions of the people in each State." *Thornton*, 514 U.S. at 848-849 (Thomas, J., dissenting); *see*

Hawke, 253 U.S. at 227 (conventions are to "voice the will of the people" and be "representative of the people"). The people also influence the process indirectly by electing the federal and state legislators who hold the amendment power. Article V does not, however, assign "the people" a direct role in proposing amendments,[38] and the Tenth Amendment reserves to them no unstated power to amend, *see United States* v. *Sprague*, 282 U.S. 716, 733-734 (1931).

When a State, through voter initiative or otherwise, coerces Members of Congress into proposing amendments, it usurps a function Article V gives to others. In *Hawke*, the Court held that a state legislature's ratification of an amendment is not subject to popular referendum because the Framers did not intend for ratification to be "left to a vote of the people." 253 U.S. at 227. And in *Leser* v. *Garnett*, 258 U.S. 130 (1922), the Court held that "the function of a state legislature in ratifying a proposed amendment to the federal Constitution, *like the function of Congress in proposing the amendment*, * * * transcends any limitations sought to be imposed by the people of a State." *Id.* at 137 (emphasis added). *Hawke* and *Leser* thus stand for the proposition that voters may not themselves ratify or propose constitutional amendments, which are functions Article V gives to Congress, state legislatures, and ratifying conventions. *See Opinion of the Justices*, 160 N.E. 439, 440 (Mass. 1928).

Although Article V does not expressly provide that a state government may not use legal sanctions to coerce Members of Congress into proposing amendments, this is a "fair

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[38] *See Dodge* v. *Woolsey*, 59 U.S. 331, 348 (1855) ("the people * * * have excluded themselves from any direct or immediate agency in making amendments to [the Constitution], and have directed that amendments should be made representatively for them"); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (" 'the people' seems to have been a term of art employed in select parts of the Constitution"); *cf.* U.S. Const. art. I, § 2, cl. 1 (Representatives are chosen "by the People").

inference or implication from Article V." *Dillon* v. *Gloss*, 256 U.S. 368, 375 (1921) (holding that amendments must be ratified in a reasonable time, even though Article V "says nothing about" that issue, *id.* at 371). Indeed, "[t]o argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Thornton*, 514 U.S. at 831. Just as voters plainly could not evade *Hawke* by instructing state legislators, through coercive sanctions, to vote on ratification of an amendment in accordance with a popular referendum, so a State may not in the same manner usurp Congress's role in proposing amendments. *Cf. Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935) (separation of powers requires that each branch be "free from the control or coercive influence, direct or indirect, of either of the others").[39]

Yet that is precisely what the Label Law seeks to do. As explained in detail above, its codified instructions and coercive labeling sanctions are a far cry from the "nonbinding, advisory referendum" considered by then-Justice Rehnquist in *Kimble* v. *Swackhamer*, 439 U.S. 1385, 1388 (1978). If States or voters favor an amendment they believe Congress is incapable of proposing, or unwilling to propose, Article V prescribes a procedure by which the States—through their legislatures—can compel Congress to call a convention for that purpose. *See The Federalist No. 85*, at 526 (Hamilton). The Label Law circumvents that constitutional process.

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[39] *See also* Pet. App. A22; cases cited *supra* note 4; *AFL-CIO* v. *Eu*, 686 P.2d 609, 613 (Cal. 1984) (Article V "envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled * * * to vote in favor of a proposal they may believe unwise") (striking down voter initiative requiring state legislators to apply to Congress to convene a Convention or else suffer loss of salary); *State* v. *Waltermire*, 691 P.2d 826 (Mont. 1984) (invalidating similar initiative that would also have forced legislators to remain in session until they complied).

The Framers vested Congress and state legislatures, and only those bodies, with the power to propose amendments so as to "secur[e] deliberation and consideration before any change can be proposed." *Hawke*, 256 U.S. at 226; *see* Story, *supra*, § 1821 ("The great principle [of Article V] is to make the changes practicable, but not too easy; to secure due deliberation, and caution"). Under the Label Law, however, legislators are told—on pain of "threatened potential political death"—"to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people." *Donovan*, 931 S.W.2d at 127-128. Such a law contravenes the carefully crafted procedures of Article V.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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